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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-860

RICHARD FREDERICK ROSS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

RICHARD FREDERICK ROSS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Richard Frederick Ross, respectfully prays that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit entered in this case on October 26, 1972.

Opinion Below

The opinion of the United States Court of Appeals for the Ninth Circuit, affirming petitioner's conviction under 50 U.S.C. App. 462, is as yet unreported; it is set forth in the Appendix, *infra,* at pp. 1a-9a. The judgment of conviction in the United States District Court for the Northern District of California was rendered without opinion and is set forth in the Appendix, *infra,* at pp. 10a-11a.

Jurisdiction

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on October 26, 1972. By order dated November 20, 1972, Mr. Justice Douglas extended the time for filing this petition to and including December 11, 1972. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

Statutory Provisions Involved

The relevant provisions of the Jury Selection and Service Act of 1968, as amended, 18 U.S.C. Sections 1861 to 1871, are set forth in the Appendix, *infra,* at pp. 12a-23a.

Questions Presented

1. Whether 28 U.S.C. Section 1865(b)(1), which imposes a one-year durational residency requirement within the judicial district as a condition for service as a federal juror, violates the Due Process Clause of the Fifth Amendment and the impartial jury guarantees of the Sixth Amendment?

2. Whether 28 U.S.C. Section 1865(b)(1), which at the time of petitioner's indictment and trial excluded persons aged 18 to 21 from federal jury service, violated the Fifth and Sixth Amendments?

3. Whether the method of jury selection in the Northern District of California, resulting in substantial exclusion of young persons, violated applicable federal standards required of federal jury selection systems as well as specific provisions of the Jury Selection and Service Act of 1968?

4. Whether petitioner can properly be convicted of refusal to submit to induction solely on the basis of documentary evidence, in the face of uncontradicted expert testimony tending to show that petitioner's refusal was not willful but the product of mental compulsion?

Statement of the Case

The petitioner, Richard Frederick Ross, was indicted on August 25, 1971, in the United States District Court for the Northern District of California and charged with refusing to submit to induction into the Armed Forces (CT 106).* The petitioner registered for the draft in 1965, was classified in a deferred student status until September, 1969, but thereafter made no effort to retain that deferred status, notwithstanding his continuation as a student (RT 11).**

The petitioner pleaded not guilty, and on January 4, 1972, he filed a motion to strike the petit jury panel and/or to dismiss the indictment. The bases for the motion were that the method of selecting jurors employed in the Northern District did not secure a representative cross-section of the community and resulted in the systematic exclusion of young persons; and that those portions of the Jury Selection and Service Act of 1968 which imposed a durational residency requirement for jury service and which excluded persons aged 18 to 21 from eligibility were unconstitutional (CT 19-26).

In support of the systematic exclusion argument, the petitioner relied upon evidence and statistics developed in

* "CT—" refers to the Clerk's Transcript.

** "RT—" refers to the Reporter's Transcript.

previous, similar challenges to jury panels in that District.[1] The burden of the factual presentation was that young persons were systematically excluded from jury service in the district, a matter of particular significance to a defendant charged with an offense that only young persons can commit, i.e., refusing to submit to induction. See 50 U.S.C. App. Section 454(a); 32 C.F.R. §1631.6. This evidence showed that the 21 through 24 age group comprised only 2.67% of the master jury wheel from which the jury was later selected. Yet that group constituted 10.62% of the over-21 population and 8.34% of the registered voters. Sixty-one persons in that group were in the pool, though 232 would be required to be in the pool to secure proportional equality. The resulting disparity between representation in the pool and in the population was 74.8%, between representation in the pool and voter registration, 66.30% (Defendant's Exhibit 4).[2]

This disparity in the representation of young persons on the master jury wheel results from a variety of factors directly caused by the method of jury selection in that District.[3] First, the master jury wheel for the San Francisco Division—where the vast majority of jury trials within the

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[1] Those other cases were all resolved in a manner which precluded the necessity for appellate consideration of the jury issues. By stipulation, the evidence developed in those cases was made part of the record here as Defendant's Exhibits 1 through 6.

[2] Precise figures for the 25 year old bracket were unavailable. Assuming that 25 year olds constituted 10% of the population in the age group of 25 to 34 year olds, they make up 12% of the area's population, yet constitute only 4% of the Master jury wheel (Defendant's Exhibit 1).

[3] Of course, the then-existing statutory exclusion of persons 18 to 21 resulted in the blanket exclusion of that group.

District take place—was filled from October 1969 to April 1970, two years before petitioner's trial. Essentially that "filling" was based not on general election voter lists, but on voter registration lists utilized at a point in time when, by virtue of "purged" voters and other factors, voter registration is at its lowest point in the two-year cycle between California elections. Similarly, the District's Jury Plan provided for emptying and refilling of the wheel only once every fourth year. Since the voter lists used in the filling completed in April 1970 were current as of a date no later than January 1970, at the time of petitioner's trial two years later no one aged 21 or 22 could possibly have been a prospective juror. Moreover, given the high degree of mobility among young people, a jury panel based on two year old voter lists is more likely to exclude a significant percentage of young voters who have moved into or within the district in that period of time. Finally, these factors were exacerbated by the granting of an automatic exemption to full-time students.

Notwithstanding this evidentiary submission, the district court denied the motion without opinion on January 14, 1972 (CT 107).

Thereafter, a jury trial was held on February 3 and 7, 1972, the only factual issue being whether the petitioner violated the Act by willfully and intentionally refusing to submit to induction. The government relied solely on a document in petitioner's Selective Service file to prove both the act of refusal and its willfulness.[4] To rebut the element

[4] The document was the form report of the induction officer indicating that petitioner refused to step forward, was warned of the consequences and offered two opportunities to comply, and did not do so.

of willfulness, the petitioner testified as to his state of mind at the induction center and introduced uncontradicted expert psychiatric testimony tending to establish that he suffered from a personality disorder which rendered involuntary his refusal to submit to induction (RT 35-41).

After deliberating for five hours, and twice requesting a re-reading of the instructions relating to willfulness (RT 61-68), the jury returned a verdict of guilty on the one count (CT 63). After the denial of a motion for acquittal for insufficient evidence, the petitioner was sentenced to two years imprisonment (CT 107).

Petitioner took a timely appeal to the United States Court of Appeals for the Ninth Circuit. After summarily dismissing the challenge to the constitutionality of the draft and the sufficiency of the evidence, the Court of Appeals discussed and rejected all of petitioner's challenges to the jury selection system.

First, the Court upheld the constitutionality of the statutory exclusion of 18 to 21 year olds from eligibility for jury service.[5] Similarly the Court ruled the durational residency requirement constitutional, holding that *Dunn* v. *Blumstein*, 405 U.S. 330 (1972), was inapplicable on the theory that decisions interpreting the Equal Protection Clause of the Fourteenth Amendment "are not automatically transferable to the due process clause of the Fifth Amendment" (App., *infra*, p. 3a). Finally, the Court rejected petitioner's claims that the manner of jury selection utilized in the district violated the statutory and decisional requirement that the jury panels be drawn from

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[5] The statute was amended in April, 1972 to eliminate the exclusion.

a fair cross-section of the community and conflicted with specific statutory provisions designed to assure such representation. More specifically, the Court concluded that there was inadequate evidence of systematic exclusion of young persons and held that, in any event, they were not an identifiable or cognizable group for the purposes of fair representation requirements (App., *infra*, pp. 3a-6a). Similarly, the Court found that the manner and frequency with which jury lists were established and replenished did not violate the Act, and that the exemption for students was consonant with Congressional intent (App., *infra*, pp. 6a-9a). Accordingly, petitioner's conviction was affirmed.

Reasons for Granting the Writ

This case presents important questions concerning the proper administration of the federal jury system. This Court has not addressed itself to such issues in the federal context since the jury exclusion cases decided in the 1940's: *Glasser* v. *United States*, 315 U.S. 60 (1942); *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217 (1946); *Ballard* v. *United States*, 329 U.S. 187 (1946).

Since that time, two important developments have occurred. First, in a long line of decisions the Court has enunciated standards to insure that in state trials "the jury will reflect a representative cross-section of the community." *Peters* v. *Kiff*, 407 U.S. 493, 33 L. Ed.2d 83, 92 (1972). This requirement is anchored not only in the defendant's right to a fair trial by an impartial jury, but also in the citizen's right not to be excluded from a public function as important as jury service. The second major development has been

the enactment of the Jury Selection and Service Act of 1968, whose purpose similarly is to insure that litigants in federal courts "shall have the right to grand and petit juries selected at random from a fair cross-section of the community" and that "all citizens shall have the opportunity to be considered for service on grand and petit juries. . . ." 28 U.S.C. Section 1861.

The petitioner claims that in two key respects the method of selection for jury service employed here departed from these constitutional and statutory objectives of securing juries representative of the community. First, the statutory imposition of a one-year durational residency requirement flatly excludes from jury service recent arrivals in the community. This issue is particularly appropriate for resolution since this Court has recently considered the validity of durational residency requirements in the context of voting, another analogous responsibility of citizenship. See *Dunn* v. *Blumstein, supra.* Second, the method by which jury selection went forward in this particular district resulted in the significant exclusion of young persons from jury lists in violation of decisional and statutory requirements. This latter set of issues, tendered against a detailed factual background, affords this Court the opportunity to interpret for the first time the relevant requirements of the federal Act in a manner which will insure the constitutional goal of an impartial jury.

1. The decision below, upholding the one-year durational residency requirement imposed by 28 U.S.C. Section 1865(b)(1) as a condition of federal jury service, conflicts with the decisions of this Court.

The Jury Selection and Service Act of 1968 requires the District Courts automatically to disqualify from jury service any person who has not "resided for a period of one year within the judicial district." 28 U.S.C. Section 1865 (b)(1). The petitioner does not challenge the requirement that a prospective juror be a resident of the district. He does challenge the durational nature of that requirement. In *Dunn* v. *Blumstein,* 405 U.S. 330 (1972), an analogous legislative classification, imposing a durational residency requirement on the right to vote, was held to contravene the Equal Protection Clause of the Fourteenth Amendment. See also, *Shapiro* v. *Thompson,* 394 U.S. 618, 641-42 (1969) (invalidating a District of Columbia durational residency requirement imposed upon welfare recipients).

The court below held the equal protection teachings of *Dunn,* and the utilization of a compelling interest standard, to be inapplicable because "classifications in federal statutes will be invalidated only if they are arbitrary or otherwise 'so unjustifiable as to be violative of due process'. *Bolling* v. *Sharpe,* 347 U.S. [497 (1954)] at 499, 500." App., *infra,* p. 3a. This view that the equal protection principles inherent in the Fifth Amendment are somehow of diminished force as a limitation on federal action is simply wrong. The Fifth Amendment imposes no less an obligation upon the federal government than does the Fourteenth Amendment upon the states. It can no longer be argued that constitutional nondiscrimination require-

ments apply with full vigor to state authorities but with diminished force to federal authorities.[6] The federal statute challenged here as violative of equal protection principles, like the one in *Shapiro* v. *Thompson*, must be subjected to the same constitutional scrutiny as though it were a state enactment.

The classification embodied in this statute infringes on three sets of fundamental rights. Like the statutes in *Dunn* and *Shapiro*, it penalizes the right to travel, long deemed fundamental. In addition, it deprives the petitioner as a criminal defendant of his Sixth Amendment right to be tried by an impartial jury representative of the community. See *Williams* v. *Florida*, 399 U.S. 78 (1970). Finally, the statute infringes upon the fundamental right of newer members of the community to participate in the governmental process by serving as federal jurors, a right so similar to participation in the electoral process. See *Carter* v. *Jury Commission of Greene County*, 396 U.S. 320 (1970); *Peters* v. *Kiff*, *supra*, 33 L. Ed.2d at 90-95.[7]

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[6] See *Shapiro* v. *Thompson*, 394 U.S. 618, 641-42 (1969); *Schneider* v. *Rusk*, 377 U.S. 163, 168 (1964); *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954); *Hobson* v. *Hansen*, 269 F. Supp. 401, 497 (D.D.C. 1967), *aff'd sub nom. Smuck* v. *Hobson*, 408 F.2d 175 (D.C. Cir. 1969); *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F.2d 959, 969-70 (4th Cir. 1963) (*en banc*), *cert. denied*, 376 U.S. 938 (1964); *Davis* v. *Richardson*, 342 F. Supp. 588, 591 (D. Conn. 1972) (three-judge court); *Morris* v. *Richardson*, 346 F. Supp. 494, 499 (N.D. Ga. 1972) (three-judge court); *Miller* v. *Laird*, Civil Action No. 752-71 (D.D.C. August 31, 1972) (three-judge court). *See also* Brief for Appellee at 28, *Welsh* v. *United States*, 398 U.S. 333 (1970) (federal government's affirmation that "equal protection" notion implicit in the Fifth Amendment precludes federal authorities from acting arbitrarily or capriciously and from engaging in invidious discrimination).

[7] *Peters* v. *Kiff* also settles that petitioner has standing to challenge the exclusion of recent residents, even though he is not a member of that group.

Because the durational residency requirement for jury service infringes on all these rights, it can be justified only if shown to be "*necessary* to promote a *compelling* governmental interest." *Dunn* v. *Blumstein, supra,* 31 L. Ed.2d at 284 (emphasis in original). This statute fails to meet the twin requirements of this standard.

Only two interests could conceivably be advanced by the statute: insuring juror familiarity with the community sense of justice and achieving administrative convenience. First, it is doubtful that excluding newcomers to the community in order to pursue a localized sense of justice is consonant with this Court's attempts to expand, not restrict, the range of attitudes and perspectives brought into the jury room. See *Peters* v. *Kiff, supra,* 33 L. Ed.2d at 94. But even if familiarity with local attitudes is a valid interest, a durational residency requirement is not necessary to achieve it. *Dunn* v. *Blumstein, supra,* 31 L. Ed.2d at 291-94. Finally, administrative convenience, rather than being served, is undermined. Since states may no longer require a year's residency as a condition of voting, state voter lists will include many citizens resident in the state for less than a year. The challenged statute imposes the additional clerical burden of eliminating from the jury lists those voters who cannot meet the longer federal residency requirement.

In sum, the durational residency requirement advances no compelling interest. It has been struck down in a variety of other contexts, and there is no reason why it should survive as an obstacle to jury service.[8]

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[8] The lower federal courts have invalidated various other durational residency requirements. *Corkey* v. *Edwards,* 322 F. Supp. 1248 (W.D.N.C. 1971), appeal filed, 40 U.S.L.W. 3048 (No. 71-92)

2. The system of selection of the jurors who indicted and convicted the petitioner resulted in the substantial exclusion of young persons.

As a consequence of a variety of factors, the jury selection system employed here resulted in the substantial exclusion of young persons, aged 18 to 26, from the list of prospective grand and petit jurors. The effect of this systematic exclusion of young persons was to deny the petitioner rights under the Constitution, the federal jury standards enunciated by this Court, and the 1968 Act itself.

The exclusion of persons in the 18 to 21 year old group was effected by the Act, which at the relevant time foreclosed jury service to those under 21. Although the Act has been amended to remedy this,[9] petitioner's constitutional challenge to the prior provision survives. Petitioner's position is simple: with Ohio's ratification of the 26th

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(four month residency requirement for therapeutic abortions); *Keenan* v. *Board of Law Examiners*, 317 F. Supp. 1350 (E.D.N.C. 1970) (one-year residency requirement for candidates for admission to the bar); *Valenciano* v. *Bateman*, 323 F. Supp. 600 (D. Ariz. 1971) (one-year residency requirement for receipt of indigent hospitalization benefits); *Crapps* v. *Duval County Hospital*, 314 F. Supp. 181 (M.D. Fla. 1970); *Arnold* v. *Halifax Hospital District*, 314 F. Supp. 277 (M.D. Fla. 1970) (same); *Vaughn* v. *Bower*, 313 F. Supp. 37 (D. Ariz. 1970), *aff'd without opinion*, 400 U.S. 884 (1970) (one-year residency requirement for receipt of mental health treatment); *King* v. *New Rochelle Municipal Housing Authority*, 314 F. Supp. 427 (S.D.N.Y. 1970) (five-year residency requirement for public housing); *Cole* v. *Housing Authority of Newport*, 312 F. Supp. 1692 (D.R.I. 1970) (two-year requirement for federal housing). Other courts have invalidated durational residency requirements for public office holders. *Zeilenga* v. *Nelson*, 4 Cal. 3d 716, 94 Cal. Rptr. 602, 484 P.2d 578 (1971); *Camara* v. *Mellon*, 4 Cal. 3d 714, 94 Cal. Rptr. 601, 484 F.2d 577 (1971).

[9] Public Law 92-269, 86 Stat. 117 (App., *infra*, p. 21a).

Amendment on June 30, 1971, antedating petitioner's indictment and conviction, the exclusion of persons under 21 from federal jury service became constitutionally unreasonable. "Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change." *Harper* v. *Virginia*, 383 U.S. 663, 669 (1966). Historically, the right to vote and the right and duty of jury service have been inextricably intertwined as aspects of citizenship. Allowing 18 year old persons to vote renders constitutionally suspect the withholding of their right to serve on federal juries.

While the total exclusion of 18 to 21 year olds was accomplished by statute, the substantial exclusion of persons age 21 through 25 was accomplished by the method of selecting jurors in the Northern District of California. That system resulted in the statistical disparities between the proportion of young persons in the community and their representation on the master jury wheel. See, pp. 3-5, *supra*. At the very least, such disparities raise a presumption of improper exclusion. See *Alexander* v. *Louisiana*, 405 U.S. 625 (1972). When federal jury selection is at issue, such an exclusion of a significant group of persons, without more, violates both the statutory requirement of "a fair cross-section of the community," 28 U.S.C. Section 1861, and this Court's decisions in *Glasser*, *Thiel*, and *Ballard*. It is not necessary that the underrepresented group constitute a cognizable or identifiable class or that its exclusion be the product of purposeful or invidious discrimination of the kind which would be interdicted under the Equal Protection Clause.[10] So long as the system used fails to achieve the

[10] The Court of Appeals held that young persons did not constitute a cognizable or "identifiable" group for purposes of determining whether their exclusion offended federal standards. But the

required cross-section of the community, there has been systematic exclusion. See *United States* v. *Zirpolo*, 450 F.2d 424 (3rd Cir. 1971); *Rabinowitz* v. *United States*, 366 F.2d 34, 58 (5th Cir. 1966).

The particular system utilized was bound to produce such exclusion because it relied upon voter lists at the low ebb of voter participation and replenished those lists infrequently. To compound the probable exclusion of young persons, an automatic exemption for students was included. The net effect was the systematic exclusion of a significant group of potential jurors.

This Court should grant review to examine the validity of this particular system in light of constitutional and statutory standards.

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requirement that a group be "cognizable" is not relevant when a federal jury system is challenged as lacking in fair representation.

However, assuming *arguendo* that a cognizable group does have to be shown, at least one Circuit has held that young persons constitute such a group for jury selection purposes. *United States* v. *Butera*, 420 F.2d 564 (1st Cir. 1970) (young adults aged 21 to 34). See also, *United States* v. *Zirpolo*, 450 F.2d 424, 431 (3rd Cir. 1971). The group suggested here—persons aged 18 to 26—is particularly appropriate in the context of a draft prosecution. Moreover, the petitioner relied on extensive and uncontradicted sociological evidence to establish that persons under 25 constitute a definable subculture in our society, a phenomenon of which this Court can almost take judicial notice.

Indeed, in urging Congress to lower the jury service age to 18, then Deputy Attorney General Richard G. Kleindienst characterized the 18 to 21 year old age group as "a large segment of citizens who make up a representative class of persons entitled to vote in Federal elections [and who] should not be excluded from Federal jury service." 1972 U.S. Code Cong. and Admin. News 1353 (May 20, 1972).

3. This Court should decide whether uncontradicted expert testimony tending to rebut the material element of wilfulness may be arbitrarily disregarded.

As is frequently the case in prosecutions under the selective service laws, the government simply relied on documents in petitioner's Selective Service file to establish that he wilfully refused to submit to induction. While the petitioner's refusal was uncontested, his wilfulness was strenuously disputed by expert testimony tending to show that his refusal was the product of a type of mental compulsion resembling an insanity defense. The expert testimony was uncontradicted and undiminished by cross-examination. While a jury may disregard expert testimony, it cannot do so arbitrarily. See, *Mims* v. *United States,* 375 F.2d 135, 143-44 (5th Cir. 1966). In the circumstances here, allowing the jury to do precisely that undermined the petitioner's right not to be convicted except upon proof beyond a reasonable doubt.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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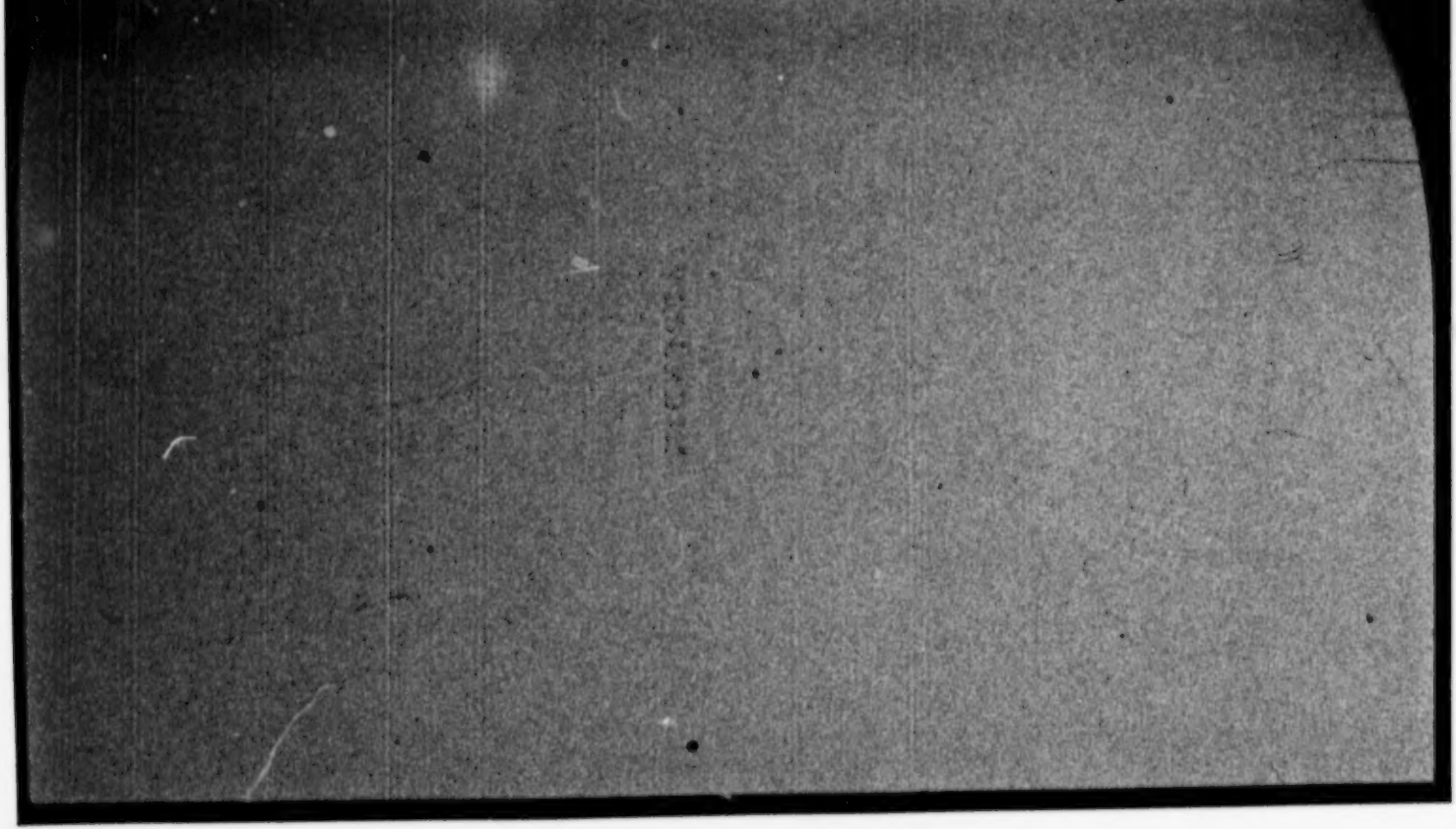
APPENDIX



Decision of the United States Court of Appeals for the Ninth Circuit

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

RICHARD FREDERICK ROSS,
Defendant-Appellant.

No. 72-1423

[October 26, 1972]

Appeal from the United States District Court for the Northern District of California

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Before: BARNES, DUNIWAY and TRASK, Circuit Judges.

DUNIWAY, Circuit Judge:

Richard Ross was convicted under 50 U.S.C. App. § 462 for refusing to submit to induction into the armed forces. We affirm.

We consider Ross' arguments *seriatim*.

I. *Constitutionality of the Draft.*

Ross' arguments are foreclosed by prior decisions of this court. *See United States v. Lumsden*, 9 Cir., 1971, 449 F.2d 154; *United States v. Harris*, 9 Cir., 1969, 412 F.2d 385, 386.

II. *Sufficiency of the evidence.*

There is ample evidence that Ross' refusal to be inducted was wilful. Psychiatric testimony to the contrary was rejected by the jury, as it could do. *Gallion v. United States*, 9 Cir., 1967, 386 F.2d 255, 257.

III. *Challenge to the jury.*

Ross' jury was drawn from a pool selected under the Jury Selection Plan for the Northern District of California (the Plan), adopted pursuant to the Jury Selection and Service Act of 1968 (the Act), 28 U.S.C. §§ 1861-71. He argues that his conviction should be reversed because of error in that process. He presents both constitutional and statutory grounds for this position.

A. *Constitutional challenge.*

1. *Exclusion of 18-21 year-olds from jury service.*

Ross argues that 28 U.S.C. § 1865(b)(1), which at the time of his trial excluded persons under 21 years of age from federal jury service, violated rights secured to him by the Fifth and Sixth Amendments to the United States Constitution.

We rejected this argument in *United States v. Duncan*, 9 Cir., 1972, 456 F.2d 1401, 1404-05. The fact that Congress, in 1972, amended the Act to reduce the minimum age to 18 (Pub. L. 92-269, § 1, (Apr. 6, 1972), amending 28 U.S.C. § 1865(b)(1)) adds no weight to Ross' argument. All that Congress' action proves is that Congress changed the law, as it has the right and power to do.

2. *One-year residency requirement.*

Ross argues that the one-year residency requirement of section 1865(b)(1) violated his Fifth and Sixth Amendment rights. Again, a similar challenge was rejected by this court in *Duncan*, *supra*, 456 F.2d at 1406.

Ross contends that in *Duncan* we applied the wrong constitutional standard to the residency requirement, and urges us to re-examine its holding in the light of *Dunn v. Blumstein*, 1972, 405 U.S. 330.

In *Dunn*, the Supreme Court held invalid a Tennessee statute which prohibited new residents from voting in state elections for certain periods of time. It found that this residency requirement could not withstand the close scrutiny required by the strict equal protection test of the Fourteenth Amendment. 405 U.S. at 342, 360. Ross would have us apply the same test here. However,

while the equal protection clause and the due process clause of the Fifth Amendment are not mutually exclusive, *see Schneider v. Rusk*, 1963, 377 U.S. 163, 168; *Bolling v. Sharpe*, 1954, 347 U.S. 497, 499, decisions applying the one are not automatically transferable to the other. Rather, classifications in federal statutes will be invalidated only if they are arbitrary or otherwise "so unjustifiable as to be violative of due process." *Bolling v. Sharpe*, *supra*, 347 U.S. at 499, 500. It was that test under which we sustained the residency requirement in *Duncan; Dunn v. Blumstein* is not in point. We adhere to our decision in *Duncan*.

B. *Statutory challenge.*

Ross argues that the Plan violates the Act in several respects, and that his conviction must therefore be reversed under 28 U.S.C. § 1867(a). We note at the outset that his motions to strike the petit jury panel and to dismiss the indictment against him were timely made under that section.

1. *Exclusion of young people.*

Ross asserts that the Plan operates in such a manner that persons 21 to 24[1] years old are substantially excluded from jury service. While the argument is not entirely clear, it seems to make two related points.

First, Ross argues that the Plan's use of voter registration lists as the exclusive source of names of potential jurors is in violation of 28 U.S.C. § 1863(b)(2).[2] This is so, he says, because young people are less politically active than their elders and hence less likely to register to vote. This argument is without merit. The Act and its legislative history clearly contemplate that the use of sources other than voter lists will be the exception

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[1]Ross actually argued that persons between the ages of 21 and 25 are systematically excluded, which he contends is significant because males over the age of 25 are no longer eligible for the draft. However, his data are broken down in such a manner that only the 21 to 24 age group can be discussed.

[2]That section provides in relevant part:

"... The plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this title...."

rather than the rule. 28 U.S.C. § 1863(b)(2); 1968 U.S. Code Cong. & Admin. News 1793-95. Ross has not alleged that the right of young persons to register to vote has been inhibited in any way. Under such circumstances, exclusive reliance upon voter lists did not violate the Act. *Bennett v. United States*, 9 Cir., 1971, 445 F.2d 638, 641; *Camp v. United States*, 5 Cir., 1969, 413 F.2d 419, 421.

Ross' second argument is that persons between the ages of 21 and 24 are systematically excluded from jury panels in the Northern District of California, and thus such panels are not drawn from a fair cross-section of the community in violation of 28 U.S.C. § 1861. At the hearing below, he introduced data purporting to show that, while persons in that age group comprised only 2.67% of the names in the master jury wheel from which his jury was later selected, they represented 10.62% of the population in the relevant geographical area and 8.34% of the registered voters in that area. He contends that these data support, indeed, compel, the inference that young people are improperly excluded from juries. We do not agree.

Because voter registration lists are the source of names of potential jurors, and because people continue to increase in age after registering, persons only recently eligible to vote will always be under-represented in the master jury wheel. This lag does not violate the Act. *Duncan, supra*, 456 F.2d at 1405-06. A bald comparison of percentages will therefore not support an inference of systematic exclusion. Moreover, Ross' data show that roughly 15% of the persons in the master jury wheel either did not respond to the juror questionnaires which were mailed to them or did not indicate their age on the questionnaire. It may well be that a disproportionate share of these "no responses" were young people; Ross' own evidence shows that they are highly mobile and less inclined to participate in governmental activities. At any rate, Ross makes no attempt to account for these persons, and the validity of his percentages is thus open to considerable question.

Ross' argument on this point fails for a second reason. It is well established that jury pools are not required to be a mirror image of the community. *Swain v. Alabama*, 1964, 380 U.S. 202, 208. To establish a violation of section 1861, it is necessary to show the systematic exclusion of an identifiable group within the

community. *United States v. James*, 9 Cir., 1971, 453 F.2d 27, 29. We hold that persons between the ages of 21 and 24 do not constitute such a group.

Both before and since passage of the Act, courts have been requested to recognize "young people" as a distinct group for purposes of determining whether a jury panel includes a fair cross-section of the community.[3] With one exception, which is distinguishable,[4] they have refused to do so. This reluctance is justified in light of the fact that the parameters of such a group are difficult to ascertain, as evidenced by the widely varying ages which have been used to define it, and that its membership and their values are constantly in flux. There appears to be no factor other than age which defines this group, and we can perceive no reason to arbitrarily single out a narrow group of "young persons" as opposed to "middle-aged" or "old" persons for purposes of jury service. In this connection we find it significant that while § 1862 of the Act prohibits excluding a citizen from jury service "on account of race, color, religion, sex, national origin, or economic status" it does not mention youth or age.

In an attempt to alleviate these concerns, Ross introduced the testimony of a sociologist and a psychiatrist to the effect that persons between the ages of 12 and 25 represent a subculture within American society which has values and mores distinctly different than those of their elders. Interesting as this evidence is, we are not persuaded by it. Both of Ross' experts conceded

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[3] *United States v. Kuhn*, 5 Cir., 1971, 441 F.2d 179 (21 to 23 year-olds); *United States v. Butera*, 1 Cir., 1970, 420 F.2d 564 (21 to 34 year-olds); *United States v. DiTommaso*, 4 Cir., 1968, 405 F.2d 385, *cert. denied*, 1969, 394 U.S. 934 (21 to 29 year-olds); *King v. United States*, 1 Cir., 1965, 346 F.2d 123 (21 to 25 year-olds); *United States v. Guzman*, S.D.N.Y., 1972, 337 F.Supp. 140 (18 to 21 year-olds, 21-24 year-olds, and 24 to 30 year-olds); *United States v. Gargan*, W.D.Wis., 1970, 314 F.Supp. 414 (21 to 26 year-olds).

[4] The one exception is *Butera, supra*. However, the court in that case was concerned about the size of the excluded group, stating: "We cannot allow the requirement of a 'distinct' group to be applied so stringently with regard to age grouping that possible discrimination against a large class of persons—in our case, those between 21 and 34—will be insulated from attack." 420 F.2d at 570. Obviously, the same considerations do not apply here. Moreover, the court in *Butera* found that the jury was properly drawn.

that there was only a rough correlation between age and the values and behaviorial trends that they described. Moreover, one of them stated that there is a dearth of reliable data on this subject, and the other acknowledged that there is a divergence of values within the youth subculture. In such circumstances, we are unwilling to require that persons between the ages of 21 and 24 must be represented in jury pools in exact proportion to their representation in the population as a whole. We have discussed the administrative problems that such a requirement would create in *Duncan, supra,* 456 F.2d at 1406.

2. *Refilling master wheel every four years.*

Ross argues that the Plan violates the Act in that it provides for refilling the master jury wheel every four years rather than every two years. He bases this argument upon 28 U.S.C. § 1869 (e), which requires that the voter list of the most recent state or federal election be used in filling the wheel, and a statement in the legislative history of the Act that this requires that the list used will be no more than two years old. 1968 U.S. Code Cong. & Admin. News 1806-07.

The short answer to this argument is that section 1869(e) does not mention when the wheel is to be refilled. At the time of Ross' trial, the Act provided only that the wheel must be emptied and refilled periodically at "specified times," 28 U.S.C. § 1863(b)(4), and the committee report stated that previous bills were found objectionable because they fixed the time for refilling. 1968 U.S. Code Cong. & Admin. News 1800. It thus seems clear that Congress originally intended to allow the districts considerable flexibility in determining when the master jury wheel is to be refilled. The Act required only that when the wheel is refilled, the most recent voter lists be used. *See United States v. Kuhn, supra,* note 3, approving a plan with a five year period for refilling.

No matter what period is chosen, there will be some lag and persons who are only recently eligible to vote will be excluded. We are unable to say that four years is an unreasonable period, especially in light of the recent amendment to the Act specifically requiring that the wheels be refilled every four years. Pub. L. No. 92-269, § 3(c) (Apr. 6, 1972).

Richard Frederick Ross

3. *Use of "off-year" voter lists.*

Ross argues that the Jury Commissioner violated the Act by refilling the master jury wheel with names taken from voter lists other than those for the most recent state or federal general election as required by 28 U.S.C. § 1869(c). It is clear that the required lists were not used. In the 1970 refilling of the master wheel from which Ross' jury was drawn, only two of the five counties in the relevant division provided lists from the 1968 general election. Of the three remaining counties, two provided lists that were current as of January, 1970, and one provided a list that was current as of December 4, 1969. However, while we agree with Ross that this practice violated section 1869(c), it is not such a substantial departure from the Act as would warrant reversal of his conviction.

It is conceded that the Plan could use either lists of persons registered to vote in the most recent state or federal election or lists of persons who actually voted at such election. 28 U.S.C. § 1863(b)(2). Under California law persons who do not vote in a general election are purged from the rolls unless they request reinstatement within a designated time. Cal. Elect. Code § 383 (West Supp. 1972). Thus, those non-conforming lists that were used in the 1970 refilling included the names of most of the persons who actually voted in the 1968 general election, persons who did not vote but requested to be reinstated, and persons who registered since the election (who, we might add, in view of Ross' other arguments in this case, would include young persons not eligible to vote in 1968).

Of those persons who voted in the 1968 election, the lists would not include the names of persons who moved to other counties in California and registered there, persons deceased since 1968, persons convicted of certain crimes since that time, and persons who requested that their names be removed from the registration list. Cal. Elect. Code §§ 381, 383 (West Supp. 1972), §§ 385, 388 (West 1961). Only the latter group would have been eligible for jury service, 28 U.S.C. § 1865, and it is unlikely that many persons request that their registration be cancelled.

In sum, use of the non-conforming lists probably resulted in a larger pool of potential jurors than if the counties involved had

provided lists of persons who had actually voted in the 1968 general election. This is certainly consistent with the policies of the Act. We are not impressed by Ross' argument that use of these lists resulted in a biased sample of new registrants because young persons are far less interested in registering for local elections. This lack of interest is not confined to the young. As we observed above, there is no evidence that young people are inhibited from registering to vote, which is all that they need to do to qualify for jury service.

We therefore hold that the departure in this case from the literal requirements of section 1869(c) was the type of harmless error that does not entitle Ross to a reversal of his conviction.

4. *Excuse of students.*

Finally, Ross challenges the provision of the Plan which excuses, upon request, "students in actual attendance at a university, college, academy or school having a regular schedule of classes." The authority for such an excuse is 28 U.S.C. § 1863 (b)(5), which provides that the Jury Plan may:

> "specify those groups of persons or occupational classes whose members shall, on individual request therefor, be excused from jury service. Such groups or classes shall be excused only if the district court finds, and the plan states, that jury service by such class or group would entail undue hardship or extreme inconvenience to the members thereof, and excuse of members thereof would not be inconsistent with sections 1861 and 1862 of this title."

Ross does not argue that the district court did not find that students would be extremely inconvenienced by jury service or that they were automatically excluded without request. Rather, he contends that this finding is erroneous, and that excusing students in this manner violates section 1861. We do not agree.

The committee report accompanying the Act indicates that section 1863(b)(5) was intended to promote local flexibility. 1968 U.S. Code Cong. & Admin. News 1800. We thus will not reverse a district court's finding that a particular group would be extremely inconvenienced by jury service unless it is clearly erro-

neous. That is not the case here. Contrary to Ross' assertion, the court could reasonably conclude that missing class and study time is more of a hardship for students than missing work is for other occupational groups. *Cf. Duncan v. United States, supra,* 456 F.2d at 1405. This is particularly so in light of the fact that jurors receive a fee for their services, which at least in part alleviates the burden to wage earners. 28 U.S.C. § 1871. Loss of educational time is not so easily compensated.

Similarly, Ross' argument that excuse of students violates section 1861 is without merit. Ross has not shown that students are excluded from jury service; they may serve if they so desire. Moreover, for the reasons discussed above, any resulting underrepresentation of young persons on jury panels does not violate the Act.

Affirmed.

Judgment of Conviction

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. Cr 71-982—SC

UNITED STATES OF AMERICA,

—v.—

RICHARD FREDERICK ROSS

On this 3rd day of March, 1972 came the attorney for the government and the defendant appeared in person and by John Hansen, Esq., counsel.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty has been convicted of the offense of refusal to submit to induction, in violation of Title 50 App. U.S.C., Section 462(a), as charged in a single-count indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized

representative for imprisonment for a period of two (2) years.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Judgment and Order of Commitment
filed this 3 day of March, 1972

SAMUEL CONTI
United States District Judge.
C. C. Evensen, *Clerk,*

By: ROSEMARY MILLER,
Rosemary Miller, *Deputy Clerk.*

Relevant Portions of the Jury Selection and Service Act of 1968, as Amended

§ 1861. *Declaration of policy*

It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

§ 1862. *Discrimination prohibited*

No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States on account of race, color, religion, sex, national origin, or economic status.

§ 1863. *Plan for random jury selection*

(a) Each United States district court shall devise and place into operation a written plan for random selection of grand and petit jurors that shall be designed to achieve the objectives of sections 1861 and 1862 of this title, and that shall otherwise comply with the provisions of this title. The plan shall be placed into operation after approval by a reviewing panel consisting of the members of the judicial council of the circuit and either the chief judge of the district whose plan is being reviewed or such other active district judge of that district as the chief judge of the district

may designate. The panel shall examine the plan to ascertain that it complies with the provisions of this title. If the reviewing panel finds that the plan does not comply, the panel shall state the particulars in which the plan fails to comply and direct the district court to present within a reasonable time an alternative plan remedying the defect or defects. Separate plans may be adopted for each division or combination of divisions within a judicial district. The district court may modify a plan at any time and it shall modify the plan when so directed by the reviewing panel. • • •

(b) Among other things, such plan shall—

(1) either establish a jury commission, or authorize the clerk of the court, to manage the jury selection process. • • •

(2) specify whether the names of prospective jurors shall be selected from the voter registration lists or the lists of actual voters of the political subdivisions within the district or division. The plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this title. The plan for the District of Columbia may require the names of prospective jurors to be selected from the city directory rather than from voter lists. • • •

(3) specify detailed procedures to be followed by the jury commission or clerk in selecting names from the sources specified in paragraph (2) of this subsection. These procedures shall be designed to ensure the random selection of a fair cross section of the persons re-

siding in the community in the district or division wherein the court convenes. They shall ensure that names of persons residing in each of the counties, parishes, or similar political subdivisions within the judicial district or division are placed in a master jury wheel; and shall ensure that each county, parish, or similar political subdivision within the district or division is substantially proportionally represented in the master jury wheel for that judicial district, division, or combination of divisions. For the purposes of determining proportional representation in the master jury wheel, either the number of actual voters at the last general election in each county, parish, or similar political subdivision, or the number of registered voters if registration of voters is uniformly required throughout the district or division, may be used.

(4) provide for a master jury wheel (or a device similar in purpose and function) into which the names of those randomly selected shall be placed. The plan shall fix a minimum number of names to be placed initially in the master jury wheel, which shall be at least one-half of 1 per centum of the total number of persons on the lists used as a source of names for the district or division; but if this number of names is believed to be cumbersome and unnecessary, the plan may fix a smaller number of names to be placed in the master wheel, but in no event less than one thousand. The chief judge of the district court, or such other district court judge as the plan may provide, may order additional names to be placed in the master jury wheel from time to time as necessary. The plan shall provide for periodic emptying and refilling of the master jury wheel at specified times.

(5) specify those groups of persons or occupational classes whose members shall, on individual request therefor, be excused from jury service. Such groups or classes shall be excused only if the district court finds, and the plan states, that jury service by such class or group would entail undue hardship or extreme inconvenience to the members thereof, and excuse of members thereof would not be inconsistent with sections 1861 and 1862 of this title.

(6) specify those groups of persons or occupational classes whose members shall be barred from jury service on the ground that they are exempt. Such groups or classes shall be exempt only if the district court finds, and the plan states, that their exemption is in the public interest and would not be inconsistent with sections 1861 and 1862 of this title. The plan shall provide for exemption of the following persons: (i) members in active service in the Armed Forces of the United States; (ii) members of the fire or police departments of any State, district, territory, possession, or subdivision thereof; (iii) public officers in the executive, legislative, or judicial branches of the Government of the United States, or any State, district, territory, or possession or subdivision thereof, who are actively engaged in the performance of official duties.

(7) fix the distance, either in miles or in travel time, from each place of holding court beyond which prospective jurors residing shall, on individual request therefor, be excused from jury service on the ground of undue hardship in traveling to the place where court is held.

(8) fix the time when the names drawn from the qualified jury wheel shall be disclosed to parties and to the public. If the plan permits these names to be made public, it may nevertheless permit the chief judge of the district court, or such other district court judge as the plan may provide, to keep these names confidential in any case where the interests of justice so require.

(9) specify the procedures to be followed by the clerk or jury commission in assigning persons whose names have been drawn from the qualified jury wheel to grand and petit jury panels.

• • • • •

§ 1864. *Drawing of names from the master jury wheel; completion of juror qualification form*

(a) From time to time as directed by the district court, the clerk or a district judge shall publicly draw at random from the master jury wheel the names of as many persons as may be required for jury service. • • •

• • • • •

§ 1865. *Qualifications for jury service*

(a) The chief judge of the district court, or such other district court judge as the plan may provide, on his initiative or upon recommendation of the clerk or jury commission, shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for, or exempt, or to be excused from jury service. The clerk shall enter such determination in the space provided on the juror qualification form and the alphabetical list of names drawn from the master jury wheel. If a person did not appear

in response to a summons, such fact shall be noted on said list.

(b) In making such determination the chief judge of the district court, or such other district court judge as the plan may provide, shall deem any person qualified to serve on grand and petit juries in the district court unless he—

(1) is not a citizen of the United States twenty-one years old who has resided for a period of one year within the judicial district;

(2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;

(3) is unable to speak the English language;

(4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or

(5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

§1866. *Selection and summoning of jury panels*

(a) The jury commission, or in the absence thereof the clerk, shall maintain a qualified jury wheel and shall place in such wheel names of all persons drawn from the master jury wheel who are determined to be qualified as jurors and not exempt or excused pursuant to the district court plan. From time to time, the jury commission or the clerk shall publicly draw at random from the qualified jury wheel such number of names of persons as may be required

for assignment to grand and petit jury panels. The jury commission or the clerk shall prepare a separate list of names of persons assigned to each grand and petit jury panel.

• • • • •

(c) Except as provided in section 1865 of this title or in any jury selection plan provision adopted pursuant to paragraph (5), (6), or (7) of section 1863(b) of this title, no person or class of persons shall be disqualified, excluded, excused, or exempt from service as jurors: *Provided*, That any person summoned for jury service may be (1) excused by the court, upon a showing of undue hardship or extreme inconvenience, for such period as the court deems necessary, at the conclusion of which such person shall be summoned again for jury service under subsections (b) and (c) of this section, or (2) excluded by the court on the ground that such person may be unable to render impartial jury service or that his service as a juror would be likely to disrupt the proceedings, or (3) excluded upon peremptory challenge as provided by law, or (4) excluded pursuant to the procedure specified by law upon a challenge by any party for good cause shown, or (5) excluded upon determination by the court that his service as a juror would be likely to threaten the secrecy of the proceedings, or otherwise adversely affect the integrity of jury deliberations. No person shall be excluded under clause (5) of this subsection unless the judge, in open court, determines that such is warranted and that exclusion of the person will not be inconsistent with sections 1861 and 1862 of this title. The number of persons excluded under clause (5) of this subsection shall not exceed one per centum of the number of persons who return executed jury qualification forms

during the period, specified in the plan, between two consecutive fillings of the master jury wheel. The names of persons excluded under clause (5) of this subsection, together with detailed explanations for the exclusions, shall be forwarded immediately to the judicial council of the circuit, which shall have the power to make any appropriate order, prospective or retroactive, to redress any misapplication of clause (5) of this subsection, but otherwise exclusions effectuated under such clause shall not be subject to challenge under the provisions of this title. Any person excluded from a particular jury under clause (2), (3), or (4) of this subsection shall be eligible to sit on another jury if the basis for his initial exclusion would not be relevant to his ability to serve on such other jury.

• • • • •

§ 1867. *Challenging compliance with selection procedures*

(a) In criminal cases, before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

(b) In criminal cases, before the voir dire examination begins, or within seven days after the Attorney General of the United States discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the Attorney General may move to dismiss the indictment or stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

(c) In civil cases, before the voir dire examination begins, or within seven days after the party discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, any party may move to stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the petit jury.

(d) Upon motion filed under subsection (a), (b), or (c) of this section, containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of this title, the moving party shall be entitled to present in support of such motion the testimony of the jury commission or clerk, if available, any relevant records and papers not public or otherwise available used by the jury commissioner or clerk, and any other relevant evidence. If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting a grand jury, the court shall stay the proceedings pending the selection of a grand jury in conformity with this title or dismiss the indictment, whichever is appropriate. If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the petit jury, the court shall stay the proceedings pending the selection of a petit jury in conformity with this title.

(e) The procedures prescribed by this section shall be the exclusive means by which a person accused of a Federal crime, the Attorney General of the United States or a party in a civil case may challenge any jury on the ground that such jury was not selected in conformity with the provisions of this title. Nothing in this section shall preclude any person or the United States from pursuing any other

remedy, civil or criminal, which may be available for the vindication or enforcement of any law prohibiting discrimination on account of race, color, religion, sex, national origin or economic status in the selection of persons for service on grand or petit juries.

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§1868. *Maintenance and inspection of records*

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§1869. *Definitions*

For purposes of this chapter—

• • • • •

(c) "voter registration lists" shall mean the official records maintained by State or local election officials of persons registered to vote in either the most recent State or the most recent Federal general election, or, in the case of a State or political subdivision thereof that does not require registration as a prerequisite to voting, other official lists of persons qualified to vote in such election. The term shall also include the list of eligible voters maintained by any Federal examiner pursuant to the Voting Rights Act of 1965 where the names on such list have not been included on the official registration lists or other official lists maintained by the appropriate State or local officials. With respect to the districts of Guam and the Virgin Islands, "voter registration lists" shall mean the official records maintained by territorial election officials of persons registered to vote in the most recent territorial general election;

(d) "lists of actual voters" shall mean the official lists of persons actually voting in either the most recent State or the most recent Federal general election;

(e) "division" shall mean: (1) one or more statutory divisions of a judicial district; or (2) in statutory divisions that contain more than one place of holding court, or in judicial districts where there are no statutory divisions, such counties, parishes, or similar political subdivisions surrounding the places where court is held as the district court plan shall determine: *Provided,* That each county, parish, or similar political subdivision shall be included in some such division;

• • • • •

(g) "jury wheel" shall include any device or system similar in purpose or function, such as a properly programmed electronic data processing system or device;

PUBLIC LAW 92-269
92ND CONGRESS, S. 1975
APRIL 6, 1972

AN ACT

86 Stat. 117

To change the minimum age qualification for serving as a juror in Federal courts from twenty-one years of age to eighteen years of age.

Jury Service. Minimum age qualification. 82 Stat. 58

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1865(b)(1) of title 28, United States Code, is amended by striking out "twenty-one years" and inserting in lieu thereof "eighteen years".

SEC. 2. Section 1863(b)(4) of title 28, United States Code, is amended by inserting before the period at the end thereof ", the interval for which shall not exceed four years".

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Master jury wheel, refill.

SEC. 3. (a) Each judicial district and each division or combination of divisions within a judicial district, for which a separate plan for random selection of jurors has been adopted pursuant to section 1863 of title 28, United States Code, other than the District of Columbia and the districts of Puerto Rico and the Canal Zone, shall not later than September 1, 1973, refill its master jury wheel with names obtained from the voter registration lists for, or the lists of actual voters in, the 1972 general election.

(b) The District of Columbia and the judicial districts of Puerto Rico and the Canal Zone shall not later than September 1, 1973, refill their master jury wheels from sources which include the names of persons eighteen years of age or older.

(c) The qualified jury wheel in each judicial district, and in each division or combination of divisions in a judicial district for which a separate plan for random selection of jurors has been adopted, shall be refilled from the master jury wheel not later than October 1, 1973.

SEC. 4. (a) Nothing in this Act shall affect the composition of any master jury wheel or qualified jury wheel prior to the date on which it is first refilled in compliance with the terms of section 3.

(b) Nothing in this Act shall affect the composition or preclude the service of any jury empaneled on or before the date on which the qualified jury wheel from which the jurors' names were drawn is refilled in compliance with the provisions of section 3.

Approved April 6, 1972.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-860

RICHARD FREDERICK ROSS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is reported at 468 F. 2d 1213.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1972. Pursuant to an order of Mr. Justice Douglas extending the time within which to file a petition for a writ of certiorari, the petition was filed on December 11, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Jury Selection and Service Act of 1968, as amended, 28 U.S.C. 1861 *et seq.*, is set forth in relevant part at Pet. App. 12a-23a.

QUESTIONS PRESENTED

1. Whether the former 21-year minimum age limit in the Jury Selection and Service Act of 1968, 28 U.S.C. 1865(b)(1), was unconstitutional.

2. Whether the one-year durational residency requirement for federal jury service in 28 U.S.C. 1865 (b)(1) violates the Fifth or Sixth Amendments.

3. Whether the evidence was sufficient to support the jury's guilty verdict, rejecting petitioner's claim of mental irresponsibility.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, petitioner was convicted of willfully refusing to submit to induction into the Armed Forces, in violation of 50 U.S.C. App. 462(a). He was sentenced to two years' imprisonment. The court of appeals affirmed (Pet. App.).

The essential facts are undisputed. Petitioner registered with the Selective Service System in 1965, and initially received a student (II–S) deferment. Upon termination of that deferment, he was ordered to report for induction on May 26, 1970 (SSF 53).[1] He reported and completed his preinduction processing (SSF 32–37), but then refused to submit to induction (SSF 39–40). An indictment was returned on August 25, 1971.

Prior to trial, on January 4, 1972, petitioner filed a motion "to strike the petit jury panel and/or to dis-

[1] "SSF" refers to petitioner's Selective Service file; "RT" denotes the reporter's transcript of proceedings in the trial court; "CT" refers to the clerk's transcript on appeal.

miss the indictment" (CT 19–26). Following a hearing, the motion was denied (CT 107). At his trial, petitioner admitted that he had refused to submit to induction.[2] A psychiatrist was called by the defense, and, over the government's objection, testified that petitioner's refusal had been "involuntary" due to a personality disorder.[3] The question of petitioner's

[2] Petitioner testified at trial to the circumstances surrounding his refusal to submit to induction. When he arrived at the induction center, he first notified an officer that he planned to refuse induction (RT 14: 5–7). He thereafter left the induction center (although advised that this was a crime) to consult with a draft counselor (RT 14: 10–25). Petitioner later returned to the induction center, took the physical examination and then refused induction (RT 15). He stated that he understood he was subject to penalties and prosecution for refusing to step forward (RT 17: 4–5), but gave as reasons for his action that he could not participate in military services, that the military represented the greatest threat to the national security, and that environmental studies are the nearest extant approach to the protection of the nation (RT 16: 5–18).

[3] The psychiatrist testified that in December 1971, some seven months after the offense, at the request of defense counsel, he had examined petitioner for a period of approximately two hours (RT 31: 9–25; RT 41: 20–21). On the basis of his examination (RT 32: 1–4), he evaluated petitioner " * * * as being basically an [obsessive] compulsive person" (RT 35: 18–19) with " * * * a very classical manifestation of anxiety" (RT 36: 8). The psychiatrist stated: "The [obsessive], compulsive quality in him that I think is particularly pertinent in this case is his very highly developed sense of what is right and wrong and his absolute need to follow that sense of what is right and wrong. Very systematically following it as far as he possibly could, and that is a very absolute conclusion" (RT 36: 9–14).

The psychiatrist concluded that, considering petitioner's emotional state, the accused did not have the ability to submit to induction (RT 41: 5–8). Petitioner was, in his view, in the same mental condition at the time of the examination as at the time of the offense (RT 43: 2–10). It was the opinion of the psy-

"willfulness" was submitted to the jury and it returned a verdict of guilty. The court of appeals affirmed.

ARGUMENT

1. Petitioner contends here, as he did below, that the grand and petit juries which returned his indictment and verdict were unconstitutionally comprised in that they did not contain a fair proportion of people under 26 years of age and excluded people under 21 years of age.[4] Petitioner was 23 years old at the time of indictment.

A. The essential thrust of petitioner's argument is that ratification of the Twenty-Sixth Amendment on June 30, 1971, guaranteeing to persons "eighteen years of age or older" the right to vote, rendered "constitutionally unreasonable" (Pet. 13) the initial determination by Congress in the Jury Selection and Service Act of 1968 (see Pet. App. 17a) to continue the traditional ineligibility for federal jury service of persons below age 21. But it does not follow from the fact that a person becomes entitled at the age of

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chiatrist that petitioner was suffering an underlying mental defect which allowed him to function quite well at levels where he felt no duress, but prevented him from functioning in duress situations (RT 41: 22–23; RT 42: 12). But, the psychiatrist also acknowledged that petitioner knew at the time of the violation that a choice was open to him (RT 42: 19–23), and that he exercised that choice in the manner indicated at least in part because of his own conscience, that is, his developed sense of right and wrong (RT 43: 18–24; RT 44: 7–9).

[4] Although petitioner's data concerning alleged under-representation relate to the age group 21–24 (see Pet. App. 3a, n. 1), he extends his argument to 25 year-olds as well (see Pet. 4, n. 2).

eighteen to vote that he also derives from that constitutional privilege, or some other, a fundamental right to serve on juries. As observed in *United States* v. *Guzman,* 337 F. Supp. 140, 144 (S.D.N.Y.), affirmed, C.A. 2, No. 72–1524, decided November 8, 1972, pending on petition for a writ of certiorari, No. 72–5837:

> The right to vote and the right to sit in judgment of others have certain fundamental differences which cannot be overlooked. The act of voting is a personal expression of favor or disfavor for particular policies, personalities, or laws. The voter is motivated by his personal self-interest, or what he considers best for the general populace.
>
> However, when one sits on a jury, he is required to accept and apply the law as the judge gives it to him, whether or not he agrees with it and no matter what his personal feelings are toward the parties in question. He must have the maturity and understanding to do what may be an unpleasant task.

Whether one should be called upon to assume the latter responsibilities when he becomes 15, 18, 21, or some other age, is a judgment for the legislature. See *Carter* v. *Jury Commission,* 396 U.S. 320, 322. Congress, in the 1968 Act, established the minimum age level for federal jury service at twenty-one. In so doing, it did not deprive those accused of criminal activity of "an impartial jury drawn from a cross-section of the community" (*Thiel* v. *Southern Pacific Co.,* 328 U.S. 217, 220), as petitioner seems to suggest.

Young people, although perhaps susceptible to categorization by age, are not a homogeneous group. As noted by the Second Circuit in *Guzman, supra,* slip op. 359, n. 5, "despite talk of 'generation gaps,' there are great disparities in opinions, attitudes, experiences and life-styles among young people." No showing has yet been made, in this or other similar cases in the federal courts, that the many and varied views and experiences of those under the age of 21 are not adequately represented by people a few years older. Indeed, the authority is virtually all to the contrary. See, *e.g., United States* v. *Duncan,* 456 F. 2d 1401 (C.A. 9), vacated on other grounds, No. 71–6773, October 10, 1972; *United States* v. *Allen,* 445 F. 2d 849 (C.A. 5); *United States* v. *Kuhn,* 441 F. 2d 179, 181 (C.A. 5); *United States* v. *DiTommaso,* 405 F. 2d 385 (C.A. 4); *King* v. *United States,* 346 F. 2d 123 (C.A. 1).[5] Accordingly, the original legislative judgment to set a 21-year minimum age limit for federal jury service has consistently been upheld as constitutional. See *United States* v. *Guzman, supra; United States* v. *McVean,* 436 F. 2d 1120 (C.A. 5); *United States* v. *Tantash,* 409 F. 2d 227 (C.A. 9); *George* v. *United States,* 196 F. 2d 445 (C.A. 9). And cf. *Carter* v. *Jury Commission, supra,* 396 U.S. at 333, n. 29.

[5] The lone exception is *United States* v. *Butera,* 420 F. 2d 564 (C.A. 1). But, as the court below noted (Pet. App. 5a, n. 4), that case involved a significantly larger age group, which prompted the court there to state (420 F. 2d at 570): "We cannot allow the requirement of a 'distinct' group to be applied so stringently with regard to age grouping that possible discrimination against a large class of persons—in our case, those between 21 and 34—will be insulated from attack."

As petitioner acknowledges, in April 1972 Congress amended the Jury Selection and Service Act in various respects, and lowered the jury service age to 18 (Pet. App. 22a). This does not mean, or even suggest, that such a change was required by the Constitution.[6] Rather it indicates only that Congress, having reassessed its 1968 position on minimum age requirements, made the considered judgment to draw the line elsewhere. As pointed out by the court below (Pet. App. 2a), it had both "the right and power" to take such action.[7]

B. Petitioner also challenges the method of selecting jurors in the Northern District of California on the basis of voter-registration lists, which are used to refill the jury wheel every four years. This system, he claims, "resulted in the statistical disparities between the proportion of young persons [aged 21 through 25] in the community and their representation on the master jury wheel" (Pet. 13). The court of appeals,

[6] Even assuming *arguendo* that ratification of the Twenty-Sixth Amendment on June 30, 1971 (approximately two months prior to petitioner's indictment) immediately vested the right to jury participation in all persons aged 18–20, some reasonable time was needed to obtain lists of such persons, which were not readily available prior to their registering to vote. See *United States* v. *Guzman*, *supra*, slip op. 360–361. Undeniably, those persons who register to vote after June 30, 1971, will be added to the jury wheel at its next replenishment. So long as there has been no attempt to exclude the new voters from their normal addition, no unconstitutional discrimination has transpired (see *Thiel* v. *Southern Pacific Co.*, *supra*, 328 U.S. at 220).

[7] In view of the fact that the present statutory age limit for jury service is the same as the minimum voting age specified in the Twenty-Sixth Amendment, the issue raised in this petition with regard to the ineligibility of 18–20 year-olds for jury service is of virtually no continuing importance.

noting that petitioner's statistical data are not without deficiencies (Pet. App. 4a), thoroughly considered the jury selection process in the judicial district and concluded that it had not produced a systematic exclusion of young people. For the reasons stated in the opinion below (Pet. App. 6a–9a), on which we rely, we submit that petitioner's arguments were correctly rejected.[8]

2. The second constitutional challenge to the Jury Selection and Service Act concerns the requirement that those eligible for jury service must have "resided for a period of one year within the judicial district" (28 U.S.C. 1865(b)(1)). Petitioner relies primarily on this Court's recent decision in *Dunn* v. *Blumstein*, 405 U.S. 330, striking down a durational residency requirement on the right to vote. But in *Dunn*, and in the other decisions cited by petitioner which invalidated durational residency requirements (Pet. 11–12, n. 8), the challenge was made by a person who had himself been deprived of a specific right because he had not lived in the particular location long enough. That is not the case here. Petitioner has not suggested any reason why the exclusion of new residents from the jury lists for a period of one year would lead to impartial juries who are unrepresentative of the community. He does assert that such an exclusion

[8] The use of voter registration lists as a source for filling the jury wheel is the source presumptively required by the Act (28 U.S.C. 1863(b)(2); Pet. App. 13a), and has been consistently upheld. See *United States* v. *Dangler*, 422 F.2d 344 (C.A. 5); *United States* v. *Butera*, *supra*; *Camp* v. *United States*, 413 F. 2d 419 (C.A. 5), certiorari denied, 396 U.S. 968; *United States* v. *Kelly*, 349 F.2d 720 (C.A. 2)); *Gorin* v. *United States*, 313 F. 2d 641 (C.A. 1), certiorari denied, 379 U.S. 971.

"infringes upon the fundamental right of newer members of the community to participate in the governmental process by serving on federal juries" (Pet. 10). But, in the absence of any cognizable prejudice to petitioner due to the durational residency requirement, we do not think he is in any position to challenge on constitutional grounds the exclusion of recent residents.

Petitioner asserts (Pet. 10, n. 7) that this Court's decision in *Peters* v. *Kiff*, 407 U.S. 493, "settles" the standing question. But this case is fundamentally different from *Peters*. There the challenge by a white man to the systematic exclusion of Negroes from jury service was permitted because the practice under attack was contrary both to " 'the Constitution and an Act of Congress passed pursuant to the Constitution * * *' " (407 U.S. at 506 (White, J. concurring, quoting *Hill* v. *Texas*, 316 U.S. 400, 406)). As the plurality opinion by Justice Marshall observed, such a racially discriminatory procedure for selecting jurors failed "to satisfy the elementary requirements of due process" (407 U.S. at 505). And the judgment of the Court in that case allowing standing rested on the concurrence of Justices White, Brennan, and Powell, who concluded that recognizing a broad right of standing would implement the strong federal statutory policy against racially motivated exclusion. Here, by contrast, we do not deal with a qualification requirement that is inherently suspect under the Due Process Clause. And the requirement itself states federal statutory policy in this area. In these circum-

stances, we do not believe it follows from *Peters* that petitioner can be heard to challenge the durational residency requirement on behalf of a group of which he is admittedly "not a member" (Pet. 10, n. 7). He has demonstrated no prejudice to himself, or to others accused of a crime, by virtue of the exclusions from jury service of new residents of the community.

In any event, the challenged requirement is faithful to the letter and spirit of the Sixth Amendment guarantee that those accused of a crime shall be tried "by an impartial jury of the State and district wherein the crime shall have been committed * * *." As the Second Circuit pointed out in *United States* v. *Duncan, supra,* 456 F. 2d at 1406: "Historically one of the virtues of the jury, whether grand or petit, is supposed to be that it is a local body acquainted with local conditions, customs and mores." The durational residency requirement in 28 U.S.C. 1865(b)(1) is intended to protect and preserve that virtue, which is embedded in the Constitution itself. To assure "some substantial nexus between a juror and the community whose sense of justice the jury as a whole is expected to reflect" (H. Rep. No. 1076, 90th Cong., 2d Sess., p. 6), Congress has quite reasonably required that members of the jury be selected from those who have resided in the judicial district for at least one year. The court below, therefore, was correct in holding (Pet. App. 2a–3a) that the legislative judgment requiring those who move to a new community to live there for one year before qualifying for federal jury service is not "so un-

justifiable as to be violative of due process" (*Bolling* v. *Sharpe*, 347 U.S. 497, 499–500). See also *United States* v. *Gast*, 457 F. 2d 141 (C.A. 7), certiorari denied, 406 U.S. 969; *United States* v. *Butera, supra*, 420 F. 2d at 573.

3. Petitioner also asks this Court to review the fact question concerning the "willfulness" of his refusal to submit to induction. That issue was, however, submitted to the jury. It heard the testimony by the psychiatrist who had examined petitioner some seven months after the offense had been committed (see n. 3, *supra*). On the basis of its evaluation of that testimony and the other evidence in the case, the jury resolved the fact question against petitioner. There is no cause for review of that finding by this Court.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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